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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
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10 RECORDING INDUSTRY
11 ASSOCIATION OF AMERICA, INC.
12 and ALLIANCE OF ARTISTS AND
13 RECORDING COMPANIES,

14 Plaintiffs,

15 vs.

16 DIAMOND MULTIMEDIA SYSTEMS,
17 INC.,

18 Defendant.
19

CASE NO.: CV 98-8247 ABC (RZx)

ORDER RE: Plaintiff's Motion for
Preliminary Injunction

20 Plaintiffs Motion for a Preliminary Injunction came on for
21 hearing on October 26, 1998. After reviewing the materials submitted
22 by the parties, the arguments of counsel, and the case file, the Court
23 hereby DENIES Plaintiffs' Motion for Preliminary Injunction.

24 I. Factual Background

25 This action arises from the efforts of Plaintiffs RECORDING
26 INDUSTRY ASSOCIATION OF AMERICA, INC. and ALLIANCE OF ARTISTS AND
27 RECORDING COMPANIES ("Plaintiffs") to preliminarily enjoin alleged
28 violations of the Audio Home Recording Act of 1992, 17 U.S.C. 53 1001
et seq. ("AHRA"), by Defendant DIAMOND MULTIMEDIA SYSTEMS, INC.
("Defendant").

1 The material facts of this case are undisputed. Plaintiffs
2 are trade organizations representing the creators, manufacturers, and
3 distributors of over ninety percent of all legitimate sound
4 recordings. Defendant is a leading manufacturer of computer products,
5 specializing in products to improve multimedia, audio, graphics,
6 video, and communications uses of personal computers. Defendant is
7 currently manufacturing - and intends to distribute - a device it
8 calls the Rio PMP 300 (the "Rio"). The Rio is a lightweight, hand-
9 held device, capable of receiving, storing, and re-playing digital
10 audio files stored on the hard drive of a personal computer. After the
11 Rio receives a digital audio file, the Rio user can detach the Rio
12 from the computer and play back the audio file separately through
13 headphones while away from the computer. Notably, the Rio has no
14 digital audio output capability, and therefore is incapable of passing
15 on digital musical files to other Rio devices, or to other
16 manufacturers' devices.

17 The Rio relies upon a relatively new technology for compressing
18 sound files: MPEG 1 Layer 3 ("MP3"). MP3 compresses by a 10:1
19 ratio, allowing approximately 60 minutes of music to be compressed to
20 12 megabytes of memory. The Rio itself contains 32 megabytes of
21 memory, but this can be doubled by the purchase of a removable memory
22 "card." Because the card is removable, a Rio user could record music
23 on the memory card, and then give that card to any other Rio user.

24 II. Procedural Background

25 On October 9, 1998, Plaintiffs filed a Complaint and Ex
26 Parte Application for Temporary Restraining Order and Order to Show
27 Cause Re. Preliminary Injunction. The Complaint alleged a single cause
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1 of action for violation of the AHRA. On October 13, 1998, Defendant
2 filed an Opposition to the Ex Parte Application for TRO. On October
3 14, 1998, Plaintiffs filed their Reply.

4 On October 16, 1998, this Court heard oral argument on the
5 merits, and issued a TRO enjoining Defendant from manufacturing or
6 distributing the Rio. The TRO was contingent on Plaintiffs posting a
7 bond in the amount of \$500,000.

8 On October 20, 1998, Defendant filed its Opposition to the
9 application for a preliminary injunction. On October 22, 1998,
10 Plaintiffs filed their Reply.

11 III. Discussion

12 A. Preliminary Injunction Standard

13 Traditionally, a court may issue a preliminary injunction if
14 it determines: (1) the moving party will suffer irreparable injury if
15 the relief is denied; (2) the moving party will probably prevail on
16 the merits; (3) the balance of potential harm favors the moving party;
17 and, depending on the nature of the case, (4) the public interest
18 favors granting relief. International Jensen v. Metrosound U.S.A., 4
19 F.3d 819, 822 (9th Cir. 1993).

20 Under the "alternative standard," a party may obtain a
21 preliminary injunction, by demonstrating either: (1) a combination of
22 probable success on the merits and the possibility of irreparable
23 injury if relief is not granted, or (2) the existence of serious
24 questions going to the merits and that the balance of hardships tips
25 sharply in its favor. Id. "The alternative standards are not
26 separate tests but the outer reaches of a single continuum." Id.
27 (quotation omitted). Essentially, the trial court must balance the
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1 competing claims of injury and must consider the effect on each party
2 of the granting or withholding of the requested relief. Schwarzer &
3 Tashima, Federal Civil Procedure Before Trial, at 13:39.

4 1. Injunctive Relief Authorized By Federal Statute

5 Plaintiffs advance two arguments in support of a departure
6 from the traditional equitable considerations governing injunctive
7 relief. First, Plaintiffs cite Trailer Train Co. v. State Board of
8 Equalization, 697 F.2d 860, 869 (9th Cir. 1983) for the proposition
9 that "traditional proof of irreparable harm is not required . . .
10 [w]here a federal statute grants authority to enjoin violations."
11 Pl.'s Reply at 19:24-26. Although Plaintiffs are correct that
12 irreparable harm is not mandatory when a federal statute authorizes
13 injunctive relief, the existence of an authorizing statute does not
14 ~~per se~~ preclude consideration of traditional equitable factors,
15 including irreparable harm. Miller v. National Labor Relations Board,
16 19 F.3d 449, 457-58 (9th Cir. 1994) (provision of National Labor
17 Relations Act authorizing injunctive relief "as deemed just and
18 proper" requires consideration of traditional equitable factors). As
19 noted in Miller,

20 [the] commonplace considerations applicable to cases in which
21 injunctions are sought in the federal courts reflect a "practice
22 with background of several hundred years of history," a practice
23 of which Congress is assuredly well aware. Of course, Congress
24 may intervene and guide or control the exercise of the courts'
25 discretion, but we do not lightly assume that Congress has
26 intended to depart from established principles. . . . Unless a
27 statute in so many words, or by a necessary and inescapable
28 inference, restricts the court's jurisdiction in equity, the full
scope of that jurisdiction is to be recognized.

26 Id. at 456 (quoting Maineberger v. Romero-Barcelo, 456 U.S. 305, 313
27 (1982); see Flynn v. United States, 786 F.2d 586, 591 (3d Cir.
28 1986) (unless federal statute requires mandatory injunction,

1 traditional equitable considerations apply).

2 In the instant action, the AHRA states that "the court - may
3 grant temporary and permanent injunctions on such terms as it deems
4 reasonable to prevent or restrain such violation[s]." AHRA §
5 1009(c)(1). In light of this discretion, the Court declines to depart
6 from traditional equitable considerations in assessing the propriety
7 of injunctive relief.

8 2. Presumption of Irreparable Harm

9 Second, Plaintiffs argue that "[t]he AHRA is inextricably
10 related to the rights provided under the Copyright Act," and that
11 therefore Plaintiffs are "entitled to [the] presumption of irreparable
12 harm that arises" in copyright actions. Plfs.' Reply at 18:10-24.¹

13 The Court disagrees. It is undisputed that "[a] copyright
14 plaintiff who makes out a prima facie case of infringement is entitled
15 to a preliminary injunction without a detailed showing of irreparable
16 harm." Triad Systems Corp. v. Southeastern Express Co., 64 F.3d 1330,
17 1335 n.9 (9th Cir. 1995) (emphasis added) (quoting Apple Computer, Inc.
18 v. Franklin Computer Corp., 714 F.2d 1240, 1254 (3d Cir. 1983)). In
19 the instant action, however, Plaintiffs are not asserting a copyright
20 claim. If, as Plaintiffs contend, the Rio is subject to the AHRA,
21 then copyright infringement is impossible as a matter of law. See
22 AHRA § 1008 (prohibiting copyright infringement actions). Even if the
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24
25 ¹ Curiously, Defendant asserts that "[t]his Court has
26 already set forth the standard on preliminary injunction in
27 Chase-Riboud v. Dreamworks, Inc., 987 F. Supp. 1222, 1224
28 (C.D.Cal. 1997)." DF.'s Opp. at 8:3-7. Chase-Riboud was a true
Copyright action in which this Court held that "a presumption of
irreparable injury arises." Chase-Riboud, 987 F. Supp. at 1232
(J. Collins).

1 Rio is not subject to the AHRA - and therefore governed by the
2 Copyright Act - Defendant has a potential "fair use" defense that
3 might defeat any prima facie showing of infringement. See Sony Corp.
4 v. Universal City Studios, Inc., 464 U.S. 417, 439-40 (1983).

5 Moreover, the relatively few copyright cases that actually
6 explain the rationale for the presumption confirm its inapplicability
7 to the instant action. For example, Plaintiffs quote from Fisher-
8 Price, Inc. v. Well-Made Toy Mfg. Corp., 25 F.3d 119, 124 (2d Cir.
9 1994) for the proposition that copyright infringement "will damage the
10 copyright holder in incalculable and incurable ways." Plfs.' Reply at
11 18:16-18. Adding context to the Fisher-Price quotation, the full
12 paragraph reads:

13 Normally, when a copyright is infringed, irreparable harm is
14 presumed; this is because the confusion created in the
15 marketplace will damage the copyright holder in incalculable and
16 incurable ways. [Citations omitted]. "[C]onfusion may cause
17 purchasers to refrain from buying either product and to turn to
18 those of other competitors. . . . Furthermore, if an infringer's
19 product is of poor quality. . . . a more lasting but not readily
20 measurable injury may be inflicted on the plaintiff's reputation
21 in the market." [Quotation omitted].

22 Id.; see also Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d
23 1280, 1288-89 (10th Cir. 1996) (presumption appropriate "[b]ecause the
24 financial impact of copyright infringement is hard to measure and
25 often involves intangible qualities such as customer goodwill"); Marcy
26 Playground, Inc. v. Capitol Records, Inc., 6 F. Supp. 2d 277, 281
27 (S.D.N.Y. 1998) ("the theory underlying the presumption rests on the
28 difficulty of remedying confusion in the market place by an award of
damages").

29 The instant action, however, does not raise issues of
30 "reputation," "quality of goods," or consumer "confusion." Moreover,

1 although a copyright action might "normally" entail "incalculable and
2 incurable" injuries, the instant action does not. The only
3 potentially "incalculable" injury asserted by Plaintiffs is the Rio's
4 contribution to the traffic in illegal MP3 files. As explained in
5 greater detail below, however, even if the Rio were to incorporate
6 SCMS technology, and thus comply with the AHRA, the Rio would still
7 contribute to the traffic in illegal MP3 files. This type of injury
8 is precisely why the AHRA provides for royalties. Accordingly,
9 although this type of injury is undeniably "incalculable," it is not a
10 compensable injury under the Act, and fails to justify an extension of
11 the irreparable harm presumption applicable in Copyright actions.

12 **B. Plaintiffs' Probability of Success on the Merits**

13 Because the Court has no precedent to guide its
14 interpretation of the AHRA, the Court begins its analysis with the
15 "familiar canon of statutory construction that the starting point for
16 interpreting a statute is the language of the statute itself. Absent
17 a clearly expressed legislative intention to the contrary, that
18 language must ordinarily be regarded as conclusive." Continental
19 Cablevision, Inc. v. Poll, 124 F.3d 1044, 1048 (9th Cir.1997) (quoting
20 Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108,
21 (1980)).

22 **1. Is the "Rio" a "Digital Audio Recording Device"?**

23 The AHRA defines a "digital audio recording device" as:

24 any machine or device of a type commonly distributed to
25 individuals for use by individuals, whether or not included with
26 or as part of some other machine or device, the digital recording
27 function of which is designed or marketed for the primary purpose
28 of, and that is capable of, making a digital audio copied
recording for private use Id. § 1001(3).

Defendant proffers two theories why the Rio is not a digital

1 audio recording ("DAR") device. First, Defendant argues that the Rio
2 is not a DAR device because the source of the copy - the computer's
3 hard drive - is not a "digital musical recording." Therefore, the Rio
4 is not capable of making a "digital audio copied recording," which, as
5 defined by Section 1001(1), is "a reproduction in a digital recording
6 format of a digital musical recording." Second, Defendant argues that
7 the Rio is not a DAR device because it does not have a digital
8 "recording function."

9 2. Does the 5(B)(ii) exclusion include a computer's hard
10 drive, thus exempting the Rio from inclusion as a DAR
11 device?

12 The AHRA governs "digital audio recording devices," defined
13 as

14 any machine or device of a type commonly distributed to
15 individuals for use by individuals, whether or not included with
16 or as part of some other machine or device, the digital recording
17 function of which is designed or marketed for the primary purpose
18 of, and that is capable of, making a digital audio copied
19 recording for private use . . ." Id. § 1001(3).

20 A "digital audio copied recording," in turn, is defined as

21 a reproduction in a digital recording format of a digital musical
22 recording, whether that reproduction is made directly from
23 another digital musical recording or indirectly from a
24 transmission." Id. § 1001(1).

25 Finally, a "digital musical recording" is defined as

26 a material object -- (i) in which are fixed, in a digital
27 recording format, only sounds, and material, statement, or
28 instructions incidental to those fixed sounds, if any, and (ii)
29 from which the sounds and material can be perceived, reproduced,
30 or otherwise communicated, either directly or with the aid of a
31 machine or device." Id. § 1001(5)(A).

32 A "digital musical recording" does not include

33 a material object -

34 (1) in which the fixed sounds consist entirely of spoken
35 word recordings, or

1 (11) in which one or more computer programs are fixed,
2 except that a digital recording may contain statements of
3 instructions constituting the fixed sounds and incidental
4 material, and statements or instructions to be used directly
5 or indirectly in order to bring about the perception,
6 reproduction, or communication of the fixed sounds and
7 incidental material. *Id.* § 1001(5)(B) (emphasis added).

8 To qualify as a DAR device, therefore, the Rio must be "capable of
9 making" a reproduction of a "digital musical recording".

10 Plaintiffs argue that the exception in Section (5)(B)(ii)
11 for "material objects . . . in which one or more computer programs are
12 fixed" is "not a 'hard drive' exception," but rather "an exception for
13 computer programs, originally designed to clarify that copying of CD-
14 ROMs containing incidental audio tracks is not intended to be
15 addressed by the AHRA." *Pls.' Reply* at 12:5-7. Plaintiffs do not
16 dispute that hard drives are not subject to the AHRA, but argue that
17 this exemption results not from Section (5)(B)(ii), but rather from
18 the Section 1001(3) definition of "DAR device," which excludes devices
19 that do not have as a "primary purpose" the recordation of digital
20 audio.

21 Defendant, in contrast, argues that the Section (5)(B)(ii)
22 is unambiguous on its face and that "material objects . . . in which
23 one or more computer programs are fixed" encompasses not only computer
24 programs on CD-ROM, but also hard drives and other "material objects"
25 including "Zip drives, integrated circuits, circuit boards and the
26 like." *Def.'s Opp.* at 10:13-14. Defendant argues that excluding hard
27 drives from the definition of "digital musical recording" was part of
28 "Congress' intent to exclude the personal computer industry" from
regulation under the AHRA. *Def.'s Reply* at 11-18:19. Although
Defendant's interpretation of Section (5)(B)(ii) has superficial

1 appeal, it is ultimately unsupported by the legislative history, and
2 contrary to the spirit and purpose of the AHRA.

3 a. Legislative History

4 Defendant relies heavily on the declaration of James Burger,
5 an attorney and former Chairman of the Intellectual Property Committee
6 of the Information Industry Council ("ITI"), a trade association
7 representing the interests of the computer industry. Burger Decl. ¶
8 2. In his capacity as Chairman of ITI, Burger purports to have
9 "engaged in direct discussions with representatives of the [Consumer
10 Electronics Manufacturers Association "CEMA"] and RIAA officials
11 regarding the AHRA, as well as Legislators and their staff." *Id.* ¶ 4.
12 On the issue of whether Section (S) (B) (ii) encompasses hard drives,
13 Burger provided the following narrative:

14 I was asked if [ITI] would not oppose the bill if computers were
15 specifically excluded from the legislation. My response was that
16 if the bill contained language that made it clear that neither a
computer nor any of its peripherals were covered we would not
oppose the legislation.

17 The result of our discussions was the specific language now
18 contained in Section 1001(S) (B) (ii). Under that subsection once
19 a music file was fixed on a computer's hard drive as semi-
20 permanent memory of any kind, it was no longer a digital musical
21 recording covered by the Act. Accordingly, we advised CEMA
22 members and the RIAA that we would not oppose the AHRA. The
23 legislative history is clear on this point:

24 "Similarly, neither a personal computer whose recording
25 function is designed and marketed primarily for the
26 recording of data and computer programs, nor a machine whose
27 recording function is designed and marketed for the primary
28 purpose of copying multimedia products, would qualify as a
'digital audio recording device.'" Senate Report 102-294 at
59-60.

24 Burger Decl. ¶¶ 10-11 (emphasis added). Although Burger unequivocally
25 opines that Section (S) (B) (ii) includes hard drives, his reference to
26 the legislative history is not persuasive.

1 The sentence Burger quotes from the Senate Report¹ to
2 support Defendant's interpretation of Section (5)(B)(iii) actually
3 appears in the context of a discussion of Section 1001(3), the
4 definition of "DAR device". The previous paragraph of the Senate
5 Report emphasizes that "[t]he definition [of a DAR device] makes clear
6 that a '[DAR] device' must be a machine or device that has a recording
7 function that is designed or marketed for the primary purpose of
8 making a digital audio copied recording." (Emphasis added).
9 Continuing, the Senate Report elaborates on the application of the
10 "primary purpose" standard, illustrating the application of the
11 standard to a videocassette recorder. See Senate Report at *52. As a
12 second example of the "primary purpose" test of Section 1001(3), the
13 Senate Report includes that language quoted by Burger:

14 Similarly, neither a personal computer whose recording function
15 is designed and marketed primarily for the recording of data and
16 computer programs, nor a machine whose recording function is designed
17 and marketed for the primary purpose of copying multimedia products,
18 would qualify as a 'digital audio recording device.'" Senate Report
19 at *52 -*53.

20 Because this language addresses the Section 1001(3) definition of
21 "primary purpose," rather than the Section (5)(B)(ii) definition of
22 "material object," Burger's reference to the passage appears
23 misplaced.²

24 ¹ Senate Judiciary Committee, 102nd Cong., 2nd Sess.,
25 Report No. 102-294, 1992 WL 133198 (June 9, 1992) (hereinafter
26 "the Senate Report").

27 ² The Burger declaration is controverted by the declaration
28 of Cary Sherman, a former partner in the law firm representing
Plaintiffs, and an RIAA representative during the negotiation of
the AHRA. Sherman states that
I met Mr. Burger in connection with industry discussions
concerning the AHRA. . . . During the Senate's consideration

1 In contrast, other portions of the legislative history/
2 support Plaintiffs' contention that Section (5) (B) (ii) was only
3 intended to avoid immunizing the illegal copying of computer programs.
4 The House Judiciary Committee Report,* for example, states that

5 A definition of "digital musical recording" has been added, with
6 revisions reflecting exceptions for talking books and computer
7 programs.

8 As with "talking books," the bill specifically excludes computer
9 programs (which generally are classified under the Copyright Act
10 as literary works). In addition to containing an express
11 exclusion of computer programs in the definition of "digital
12 musical recording," the Committee expressly includes the
13 technical embodiment of statements of instructions incidental to
14 the playback or reproduction of music by referencing such
15 statements or instructions in both sections 1001(5) (A) (i) and
16 (B) (ii).

17 House Report at *21. These passages, albeit far from unequivocal,
18 suggest a legislative intent to avoid immunizing the illegitimate
19 copying of computer programs from liability for copyright
20

21 _____
22 of [the AHRA], I discussed aspects of the AHRA with
23 representatives of [the Computer and Business Equipment
24 Manufacturers Association], although I do not specifically
25 remember Mr. Burger having a leading role in those
26 discussions.

27 [I]t should be clear that at no time in the process that
28 preceded the enactment of the AHRA was there any significant
question that the AHRA would not cover general purpose
computers and general purpose devices. However, that
understanding was always enshrined in the "primary purpose"
test of the definition of "[DAR] device" now codified at 17
U.S.C. § 1001(3). Mr. Burger is simply wrong when he
29 suggests that the definition of "digital musical recording"
30 codified at 17 U.S.C. § 1001(5) (A) (ii) was in some way
31 intended to reflect that understanding. (Emphasis added).

32 The Court is aware, of course, that as a former attorney for
33 Plaintiffs, Sherman is far from a disinterested witness.

34 * House Judiciary Committee, 102nd Cong., 2nd Sess., 1992
35 WL 232935 (September 17, 1992) (hereinafter "the House Report").

1 infringement.

2 b. Purpose of the AHRA

3 More importantly, Defendant's construction of Section
4 (S) (B) (ii) would effectively eviscerate the AHRA. Any recording
5 device could evade AHRA regulation simply by passing the music through
6 a computer and ensuring that the MP3 file resided momentarily on the
7 hard drive.

8 Defendant makes no attempt to rationalize this result, but
9 rather argues that technology has outpaced the AHRA, and that this
10 Court should not re-legislate statutes which failed to anticipate new
11 technology. See Transcript of Oral Arg. (TRO Hearing) at 16:2-5
12 (October 16, 1998). Although the line between "interpretation" and
13 "re-legislation" is not easily defined, the Court is skeptical that
14 Congress intended Defendant's counter-intuitive construction of
15 Section (S) (B) (ii).

16 3. Recording Function

17 As previously noted, the AHRA only governs DAR devices,
18 defined as

19 any machine or device . . . , whether or not included with or as
20 part of some other machine or device, the digital recording
21 function of which is designed or marketed for the primary purpose
22 of, and that is capable of, making a digital audio copied
23 recording for private use. AHRA § 1001(3).

24 Defendant argues - albeit briefly - that the Rio has no "recording
25 function" because "unless software on [the] personal computer is used
26 to manage the transfer of files, the Rio will not record anything."
27 Df.'s Opp. at 8:18-20. Although not expressly stated, Defendant's

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 * Defendant devotes less than one page of its twenty-five
page Opposition to this issue. See Df.'s Opp. at 8:14-9:8.

1 argument suggests that if a peripheral device were reliant on a
2 personal computer for any step in the recording process - thereby
3 precluding truly "independent" recording -- the peripheral device has
4 no "recording function" for purposes of the AHRA.

5 Defendant's argument is premised on a single reference in
6 the legislative history:

7 Although the typical computer would not fall within the
8 definition of "digital audio recording device," a separate
9 peripheral device with an independent recording function would be
10 a "digital audio recording device" if the recording function was
designed or marketed for the primary purpose of making digital
audio copied recordings for private use. Senate Report at *53
(Emphasis added).

11 Aside from this passage, nothing in the legislative history even
12 remotely suggests that lack of a completely independent recording
13 function removes a device from the purview of the AHRA. To the
14 contrary, the legislative history establishes that the phrase
15 "recording function", was included to ensure that the "primary purpose"
16 test was only applied to the audio recording function of a device that
17 could record audio, video, and multimedia. [Cite to Sen Report].

18 Similarly, nothing in the definition of Section 1001(3)
19 remotely suggests that DAR devices must be able to record
20 independently from the computer. The statute only requires that DAR
21 devices be "capable of making a . . . recording." AHRA § 1001(3). It
22 does not say "independently capable of making recordings."

23 Finally, Defendant's interpretation of the phrase "recording
24 function" is contrary to the purposes of the AHRA. Any device not
25 capable of truly independent recording would evade regulation under
26 the AHRA, even though the device was capable of making digital audio
27 reproductions. The Court is not inclined to undermine the entire
28

1 statutory scheme based on a single, isolated comment in the
2 legislative history.

3 4. Serial Copying

4 The AHRA defines "serial copying" as
5 the duplication in a digital format of a copyrighted musical work
6 or sound recording from a digital reproduction of a digital
7 musical recording. AHRA § 1001(11).

8 The Court concurs with Plaintiffs that the two-step process
9 at issue here (audio CD to hard drive; hard drive to Rio) appears to
10 technically satisfy the definition of "serial copying." A
11 conventional audio CD is a "digital musical recording," and the MP3
12 file "ripped" from an audio CD and stored on the hard drive is a
13 "digital reproduction" of that "digital musical recording." Finally,
14 the version in the Rio is a "duplication" of the "digital
15 reproduction" on the hard drive. Although a personal computer is not
16 a "digital audio recording device," the definition of "serial copying"
17 in Section 1001(11) does not require that the digital reproduction
18 (i.e., the MP3 file on the hard drive) be generated by a "digital
19 audio recording device."

20 However, although the Rio is bundled with software that
21 facilitates the first step (audio CD to hard drive), that software is
22 independently available today. The innovation the Rio makes possible
23 is the second step (hard drive to Rio).

24 5. Section 1002(a)

25 Although the two-step process technically satisfies the
26 definition of "serial copying," the AHRA does not directly prohibit
27 serial copying. Rather, Section 1002(a) states that

28 No person shall import, manufacture, or distribute any digital
audio recording device . . . that does not conform to -

(1) the Serial Copy Management System ["SCMS"];

(2) a system that has the same functional characteristics as the [SCMS] and requires that copyright and generation status information be accurately sent, received, and acted upon between devices using the system's method of serial copying regulation and devices using the [SCMS]; or

(3) any other system certified by the Secretary of Commerce as prohibiting unauthorized serial copying.

Thus, if Defendant incorporated SCMS technology into the Rio, no violation of Section 1002 occurs because the Rio would satisfy subsection (a)(1). This holds true even though the two-step process (CD to hard drive; hard drive to Rio) technically satisfies the Section 1001(11) definition of "serial copying." Incorporating SCMS into the Rio, however, accomplishes nothing. The Rio could not "act[] upon . . . copyright and generation status information" because the MP3 files on the computer's hard drive do not contain this information.⁶ Similarly, it is undisputed that the Rio does not permit downstream copying because the Rio itself has no digital output capability, and the removable flash memory cards cannot be copied by another Rio device. Therefore, it is nonsensical to suggest that the Rio must "sen[d]. . . copyright and generation status information."⁷ In summary, incorporating SCMS into the Rio appears an exercise in

⁶ Incorporating SCMS into the Rio would not prevent the Rio from downloading an MP3 file from a computer's hard drive. See Pohlmann Supp. Dec. ¶ 8 ("SCMS restricts the copying of digital source material that has been encoded to assert copyright protection"). Because MP3 files are not "encoded to assert copyright protection," SCMS would not prevent downloading.

⁷ See Senate Report at *26 ("Devices that receive digital audio transmissions sent without copyright and generation status information shall indicate that copyright is asserted over the transmitted audio material and that the generation status is original.").

1 futility. Because a Rio with SCMS would not violate Section 1002, and
2 because a Rio without SCMS is functionally equivalent to a Rio with
3 SCMS, the Court is convinced that the Secretary of Commerce will
4 conclude that the Rio adequately "prohibit(s) unauthorized serial
5 copying" for purposes of subsection (a)(3).⁹ Accordingly, Defendant
6 is only violating Section 1002(a) in a most technical sense - by
7 failing to acquire a certificate.⁹

8 In summary, Plaintiffs' probability of success on the merits
9 is mixed. Although Plaintiffs have established a probability that the
10 Rio is a "digital audio recording device," Plaintiffs have not
11 established a probability of success in establishing that the Rio, if
12 assessed by the Secretary of Commerce, would fail to satisfy Section
13

14 ⁹ Defendant argues that for over six years the Secretary of
15 Commerce has failed to establish procedures to verify compliance
16 with Section 1002. Section 1002(b), however, only requires the
17 Secretary to "establish a procedure to verify . . . that a system
18 meets the standards set forth in subsection (a)(2)." (Emphasis
19 added). Subsection (a)(2), however, only applies to a device
20 that has "a system that has the same functional characteristics
21 as the [SCMS] and requires that copyright and generation status
22 information be accurately sent, received, and acted upon. . . ."
23 Section (a)(2), therefore, applies only to devices with digital
24 encoding systems that are similar - but not identical - to SCMS.

Because the Rio does not have a digital encoding system, it
does not fall under section (a)(2), and Defendant cannot complain
about lack of administrative regulations. Nothing in Section
1002 suggests that elaborate regulations are required for the
Secretary to certify a device, pursuant to subsection (a)(3), as
a device incorporating a "system . . . prohibiting unauthorized
serial copying."

⁹ Because Plaintiffs have successfully raised serious
questions going to the merits, the Court need not address
Plaintiffs' argument that - even if a hard drive falls within
Section (5)(B)(ii) - the immediate source of a "digital audio
copied recording" (i.e., the hard drive) is irrelevant. See
Plfs.' Reply at 9:4-11:19.

1 1002(a)(3).

2 C. Irreparable Injury

3 Plaintiffs acknowledge that, for purposes of preliminary
4 injunction, the irreparable injury "must be caused by the alleged
5 wrongful conduct." Stanley v. University of So. Calif., 13 F.3d 1313,
6 1324-25 (9th Cir. 1994) (emphasis added) (cited in Plaintiffs' Reply at
7 19:26-28).

8 Assuming that the Rio is subject to the AHRA, and that
9 Defendant ultimately pays any required royalties, the only potential
10 "wrongful conduct" is Defendant's failure to encode SCMS information
11 on recordings stored in the Rio. For the reasons articulated above,
12 the Court is skeptical that the Secretary of Commerce would require
13 Defendant to incorporate SCMS technology. Even if the Secretary did
14 impose that requirement, Plaintiffs have failed to demonstrate a
15 sufficient causal relationship between this "wrongful conduct" and
16 their alleged injuries.

17 Plaintiffs contend that distribution of the Rio in its
18 current configuration "will harm plaintiffs and the public interest by
19 dramatically stimulating the traffic in illegal MP3 files." Pfs.
20 Reply at 20:20-22. Although the Rio will inevitably be used to record
21 both legitimate music (e.g., commercially available CDs) and
22 illegitimate music (e.g., copyrighted music illegally posted on the
23 Internet), the absence of the SCMS information does not cause the
24 illegitimate uses. Even if the Rio did incorporate SCMS, a Rio user
25 could still use the device to record unauthorized MP3 files posted to
26 the Internet. Moreover, to the extent Plaintiffs are injured through
27 an illicit use of the Rio, this is precisely the type of injury for

1 which the royalty provisions were adopted. Under these circumstances,
2 the Court concludes that Plaintiffs have failed to establish any
3 irreparable or incalculable injury.¹⁹

4 In contrast, Defendant has offered credible evidence that an
5 injunction would substantially impact its projected revenues from the
6 sale of the Rio. See Df.'s Opp. at 7:1-27. Regardless of the
7 accuracy of Defendant's estimate (\$200 million over the next two
8 years), the Court is convinced that Defendant would at a minimum
9 suffer multi-million dollar losses. Moreover, because the Rio is
10 capable of recording legitimate digital music, an injunction would
11 deprive the public of a device with significant beneficial uses.

12 IV. Conclusion

13 For all these reasons, the Court hereby DENIES Plaintiffs'
14 Motion for a Preliminary Injunction.

15 SO ORDERED.

16 DATED: _____

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18 _____
19 AUGUST B. COLLINS
UNITED STATES DISTRICT JUDGE
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27 ¹⁹ With regard to royalties, it will be relatively simple
28 for Plaintiffs to establish the volumetric distribution and sales
of Rio devices to the public.